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State v. Urrizaga Respondent's Brief Dckt. 39479

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**PRO SE
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Richard John Urrizaga appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of The Proceedings

Urrizaga pled guilty to trafficking in methamphetamine and the court imposed a unified 22-year sentence with 12 years fixed. (R., pp.47-48.) Urrizaga appealed and the Court of Appeals affirmed his judgment of conviction and sentence in August 2004. State v. Urrizaga, Docket No. 30174 (Idaho App. August 12, 2004) (unpublished).

On July 28, 2011, Urrizaga filed a *pro se* petition for post-conviction relief. (R., pp.12-16.) Urrizaga did not allege any particular claim in his petition, but instead referred to attachments to the petition, which included an affidavit of facts in support of the petition and "three letters w/ letterhead from Idaho State Police dated May 3rd 2011, referencing possibly Brady Giglio material." (R., p.13 (verbatim, but capitalization altered).) In his affidavit, Urrizaga asserted his "belie[f] that the unknown substance that police alleged was found in [his] possession was not an illegal drug." (R., p.17.) Urrizaga "further contend[ed] that the ISP forensic laboratory either accidentally or purposely substituted 'unaccounted for' drugs that they held hidden on the premises in order to secure a conviction or force a plea." (R., p.17.) Urrizaga also alleged the forensic laboratory "could have easily used" the "uninventoried [sic] drugs" for "bogus testing." (R., p.17.) The letters referred to in Urrizaga's petition, which he

attached as Exhibits A, B, and C are letters from Major Kedrick Wills, the Forensic Services Commander with the Idaho State Police, written to "Idaho County Prosecuting Attorneys and Idaho Municipal Attorneys" on May 3, 2011. (R., pp.19-21.) All three letters reference "potential *Brady/Giglio* material" and, more specifically, Major Wills advises that certain employees of the state forensic lab "maintained an ongoing unauthorized quantity of controlled narcotics for display purposes, outside the practices of the Forensics Quality Manual and without proper document, tracking and auditing" (R., p.19; see also p.20), and one lab employee ordered and maintained an unauthorized amount of Gamma-hydroxybutyric Acid (GHB)" (R., p.21). Urrizaga also attached to his petition a letter from the State Appellate Public Defender, dated June 13, 2011, that advised him of the irregularities referenced in the three letters. (R., p.22.)

In conjunction with his petition, Urrizaga filed a motion for appointment of counsel, which the district court granted. (R., pp.23-27.) Approximately one month later, on September 2, 2011, the district court filed a Notice of Intent to Dismiss Post-Conviction Petition ("Notice"). (R., pp.47-53.) In its Notice, the Court advised Urrizaga that it intended to dismiss his petition because he failed to "present any admissible evidence supporting his allegation that the misconduct by the Idaho State forensic laboratory applies to him." (R., p.52.) The court gave Urrizaga 20 days in which to respond to its Notice. (R., p.53.)

On September 15, 2011, post-conviction counsel filed a motion for an extension of time in which to respond to the court's Notice, which the court granted, giving Urrizaga until October 30, 2011, to file his response. (R., pp.55-

58.) Having received no response by November 1, 2011, the court dismissed Urrizaga's petition for the reasons stated in its Notice. (R., pp.60-61.) Urrizaga filed a timely notice of appeal. (R., pp.63-65.) Although the district court appointed counsel to represent Urrizaga on appeal (R., pp.67-68), appellate counsel subsequently filed a motion to withdraw because he was unable to identify any "viable appellate issues" (Affidavit in Support of Motion for Leave to Withdraw and Motion to Suspend Briefing Schedule, dated July 5, 2012). The Court granted appellate counsel's motion. (Order Granting Motion for Leave to Withdraw and to Suspend the Briefing Schedule, dated July 27, 2012.)

ISSUE

Urrizaga's statement of the issue on appeal is set forth on page 5 of the Appellant's Brief. For clarity, the state rephrases the issue on appeal as:

Should the Court decline to consider any of Urrizaga's claims on appeal because they are not preserved and because he has failed to support his claims with argument and authority? Alternatively, has Urrizaga failed to establish error in the summary dismissal of his petition for post-conviction relief?

ARGUMENT

The Court Should Decline To Consider Urrizaga's Claims On Appeal Because They Are Not Preserved And He Has Failed To Support The Claims With Argument And Authority; Alternatively, Urrizaga Has Failed To Show Error In The Summary Dismissal Of His Post-Conviction Petition

A. Introduction

The entirety of Urrizaga's argument on appeal is that "fairness" requires the court "at least be presented with the right case" and post-conviction counsel's alleged "inability to recognize the difference in case number is inexcusable." (Appellant's Brief, p.6.) Although these complaints may be the result of post-conviction counsel's representation in this case, they are not claims that were raised in the petition. As such, they are not properly before the Court. Further, Urrizaga has failed to support the claims with argument and authority. Alternatively, Urrizaga has failed to establish the district court erred in summarily dismissing his petition.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The Court Should Decline To Consider Any Of Urrizaga's Claims

It is well-settled that an appellate court will not consider claims that were not raised below. State v. Hardwick, 150 Idaho 580, 582, 249 P.3d 379, 381 (2011). Urrizaga's complaints about his post-conviction attorney were not claims raised in his petition nor were they ever presented to the district court. As such, they should not be considered by this Court. The Court should likewise decline to consider the documents Urrizaga has attached to his brief in support of his complaints about counsel as they were also never presented to the district court.

In addition, Urrizaga has failed to support his complaints about counsel with argument and authority. "When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered." State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Although Urrizaga has recited the general nature of his claims on appeal, he has offered no argument in support of his claims and he has failed to cite any supporting legal authority. (Appellant's Brief, p.6.) The lack of any citation to authority and the absence of any relevant argument also precludes consideration of Urrizaga's claims.

D. Urrizaga Has Failed To Establish The District Court Erred In Summarily Dismissing His Petition

Even if the Court was willing to overlook the flaws in the Appellant's Brief and consider whether the district court erred in summarily dismissing Urrizaga's petition, a review of the record and the applicable legal standards shows summary dismissal was appropriate. Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's

motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner's un rebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

In its Notice, the district court articulates the applicable legal standards and sets forth, in detail, the reasons Urrizaga failed to demonstrate he was entitled to relief. The state adopts the district court's Notices as its argument on appeal, a copy of which is attached hereto as Appendix A. Urrizaga does not

specifically challenge any of the courts findings or legal conclusions (see generally Appellant's Brief), and he has otherwise failed to establish the district court erred in dismissing his petition.

CONCLUSION

The state respectfully requests this Court affirm the district court's order summarily dismissing Urrizaga's petition for post-conviction relief.

DATED this 14th day of December, 2012.




JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December, 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

RICHARD URRIZAGA, #35703
SAINT ANTHONY WORK CENTER GENERAL HOUSING
125 N. 8TH WEST
ST. ANTHONY, ID 83445



JESSICA M. LORELLO
Deputy Attorney General

APPENDIX A

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CLARK

DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

RICHARD JOHN URRIZAGA,)
)
Petitioner,) Case No. CV-2011-3392
)
vs.)
) **NOTICE OF INTENT TO DISMISS POST-**
STATE OF IDAHO,) **CONVICTION PETITION**
)
Respondent.)
)

INTRODUCTION

The Court has reviewed the Petition for Post-Conviction Relief filed by petitioner RICHARD JOHN URRIZAGA on 07/28/11. In accordance with Idaho Code section 19-4906(b), the Court notifies petitioner that the Court finds there is no merit to this petition and gives NOTICE OF INTENT TO DISMISS the Petition for the reasons stated herein.

PROCEDURAL HISTORY

RICHARD JOHN URRIZAGA (Urrizaga) pled guilty to Trafficking in
Methamphetamine and was sentenced to twenty-two (22) years with twelve (12) years
NOTICE OF INTENT TO DISMISS SUCCESSIVE
POST-CONVICTION PETITION - 1

determinate. A subsequent appeal of the sentence was affirmed. Urrizaga then filed a Rule 35 motion which was denied. The district court's Rule 35 denial was later affirmed on appeal. Upon receiving notices of misconduct at the Idaho State Police laboratory, Urrizaga filed the present claim.

ANALYSIS

Urrizaga argues that information regarding the ISP's compliance problems provide sufficient reasons for this court to consider his post-conviction application. An application for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like the plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). "An application for post-conviction relief differs from a complaint in an ordinary civil action[.]" *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). The application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application must be verified with respect to facts within the personal knowledge of the applicant,

and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post-conviction relief will be subject to summary dismissal . . . if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 4 739 (1998)). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the State does not controvert the applicant's evidence, because the court is not required to accept either the applicant's mere conclusory allegations,

unsupported by admissible evidence, or the applicant's conclusions of law. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

The statute of limitation for post-conviction actions provides that a petition for post-conviction relief "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later." I.C. § 19-4902. Clearly the current petition is well beyond the one-year statute of limitations inasmuch as his conviction was last affirmed in August 2004.

Urrizaga claims harmful error occurred due to the misconduct by the Idaho State forensic lab. Urrizaga did not provide any detail on how the lab was involved, although that information may be assumed. Urrizaga was notified of potential misconduct by the Lab by a letter from the State Appellate Public Defender on June 13, 2011. The letter states "as early as 2003, certain improprieties occurred in at least one of the state's forensic laboratories." (Petitioner's Unmarked Exhibit.) The letter does identify the nature of the claimed improprieties. It continues, "the State Appellate Public Defender has not determined whether the information contained herein actually affected your case." *Id.*

This allegation could not have been properly asserted in any of Urrizaga's prior filings simply because it was not known to him at the time of the previous filing.

Nevertheless, a defendant does not have an indefinite time within which to file a post-conviction petition asserting newly discovered matters. A petition alleging new matters is untimely and should be dismissed unless the doctrine of equitable tolling applies.

Person v. State, 147 Idaho 453, 454, 210 P.3d 561, 562 (Ct. App. 2009). An exception also exists if there is newly discovered evidence affecting the defendant's due process rights. *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007).

Equitable tolling would allow Urrizaga's claim to proceed despite being untimely. *Id.* Equitable tolling has only been applied in two situations by Idaho Courts: "where the petitioner was incarcerated in an out-of state facility on an in-state conviction without legal representation or access to Idaho legal materials and where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction." *Person*, 147 Idaho at 454, 210 P.3d at 562. Neither of these situations is applicable to Urrizaga.

The Court has held that "there may be a tolling of the one year statute of limitations until discovery of [a] *Brady* violation;" essentially allowing tolling in cases where an important due process claim is raised. *Id.* After discovery of a *Brady* violation, the defendant must file the petition for post-conviction relief within a "reasonable time," the same standard used in capital post-conviction cases. *Id.* This doctrine applies to successive post-conviction petitions. The Court finds that Urrizaga has filed his

petition concerning the lab issue within a reasonable period of time of discovery because this claim contemplates a *Brady* violation.

However, permitting the filing of this application does not entitle Urrizaga to relief. Urrizaga does not provide any specific information about the lab improprieties, their relation to his case, or of the actual impact those improprieties may have had on his conviction. As discussed above, Urrizaga must allege facts that if resolved in his favor would entitle him to the requested relief in order to survive summary dismissal. *See Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. While the knowledge gained from the letter may be enough to allow Urrizaga's petition on this issue, Urrizaga has failed to allege facts to show that the lab's testing in his case was inaccurate. At most, he simply implies that such is the case. The Idaho Code requires that the petition be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. Urrizaga's application simply does not present any admissible evidence supporting his allegation that the misconduct by the Idaho State forensic laboratory applies to him.

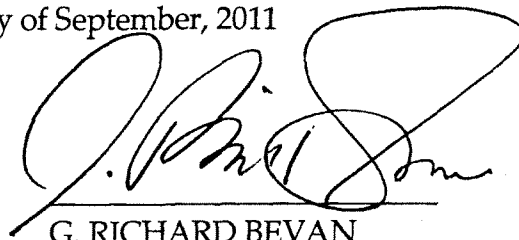
CONCLUSION AND ORDER

This court finds that Urrizaga's petition relating to claimed misconduct of the lab is timely, but that Urrizaga has failed to assert facts which would entitle him to relief relating to misconduct by the State forensic lab. Accordingly petitioner is hereby notified that based upon consideration of the Petition and the record presented to this court, this court provisionally INTENDS TO DISMISS the Petition for the reasons set forth above.

Petitioner is hereby notified that he is entitled to reply to this notice of intent to dismiss within twenty (20) days following the date of this order. In the event that petitioner shall fail to respond or shall fail to make timely or adequate response, the petition will be dismissed with prejudice without further notice or hearing pursuant to Idaho Code section 19-4906(b).

IT IS SO ORDERED.

DATED this 2 day of September, 2011

A handwritten signature in black ink, appearing to read "G. Richard Bevan", written over a horizontal line.

G. RICHARD BEVAN
District Judge